Supreme Court of the United States

OCTOBER TERM, 1969

No. 778

In the Matter of SAMUEL WINSHIP,

Appellant.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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Statement of Interest of the Attorney General of the State of New York

This case involves the constitutionality of § 744(b) of the Family Court Act, which provides that any determination in a Family Court fact-finding hearing that a juvenile committed certain acts, must be based upon a preponderance of the evidence. This rule is in harmony with the civil nature of Family Court proceedings, which seek to rehabilitate children rather than to punish offenders.

As the chief legal officer of the State (New York Executive Law, § 63), the Attorney General is charged with the defense of enactments of our State Legislature (Executive Law, § 71). The Attorney General's concern is the preservation of the civil character of hearings and dispositions in the Family Court.

Questions Presented

1. Does the requirement in the New York Family Court Act that any determination at the conclusion of a fact-finding hearing that a juvenile committed an act or acts must be based on a preponderance of the evidence, raise an issue under the due process clause of the Fourteenth Amendment or deny to juveniles due process of law?

2. Does separate treatment for children under 16 in the New York Family Court create an invidious distinction in violation of the equal protection clause of the Fourteenth Amendment, where all due process rights of such juveniles are preserved?

Statement of the Case

Appellant was charged with juvenile delinquency for an alleged act of larceny, in a petition filed in New York Family Court on March 30, 1967. The fact-finding hearing on this charge was conducted on March 30, 1967 before the Hon. Millard Midonick. Appellant was represented by an attorney from the Legal Aid Society.

The Evidence:

The petitioner in the Family Court proceeding was Rae Goldman, a saleslady at a furniture store in the Bronx, New York (4).* On March 28, 1967, at 6:15 in the evening petitioner was informed by a co-worker that the door to a small bathroom adjoining the locker room was locked (5). They waited to see who would emerge from the bathroom, and after a few moments appellant came out and ran from the store (5). Mrs. Goldman

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* References are to page numbers in appellant's Appendix.

rushed to see if her handbag, which had been left in the locker room at 5:30, was still there (5, 8). The handbag had disappeared, and was later found on the bathroom floor with the contents scattered and $112.00 of petitioner's money missing (5, 6). There were no customers in the store at the time, as it was the dinner hour; only two other employees were present (7).

Petitioner called the police, and described the boy to Patrolman Clarke as wearing a coat with a fur collar, glasses and a leather cap (10, 18, 19, 21). She had seen the boy not only when he ran out of the store (it was still daylight at the time), but had also seen him on at least 6 prior occasions "sneaking around and prowling around the store" (6, 7). He always carried a little shoe box with him and had once shined her shoes in the store (7).

Patrolman Clarke then testified that at about 8:30 P.M. on March 29, 1967 (the night following the theft of Rae Goldman's handbag), he found appellant trespassing in a bakery at East Fordham Road, less than 4 blocks from the store where Mrs. Goldman works (21-23). At the time he was apprehended, appellant had a shoe shine kit and two rolls of dimes totalling $10.00 (23). Appellant's counsel stated in connection with these dimes:

> "The boy said that he did not enter the premises of the bakery shop with the intent to commit a crime therein. He often went into the store to give shoe shines to the owner. When he went in, he saw the money lying on an open safe. He took the dimes to give to the clerk of the store and to tell the clerk that the money was not safe there." (30)

The Court Probation Officer informed the Court that at that time appellant, a twelve-year-old boy, was a parolee from a training school, his parole having been extended for 1 year as of 2/28/67. He had been sent to the training school for setting a fire and for burglary (30, 31).

Appellant's mother testified that her son left the house at about 3 or 4 o'clock on March 28, 1967 to go bicycle riding with his sister. He returned a little after 5:00 and they had dinner at 6:00 (11). In the evening he watched television with his father and did not leave the house (21).

Melvin Coleman, appellant's uncle, stated that he and appellant had eaten dinner together with appellant's mother every night on the week in question (16). However, after Patrolman Clarke testified that he had caught appellant on Wednesday evening in the bakery, the witness was recalled and testified that he had eaten with the family only on Monday and Tuesday (26).

Appellant testified that he had gone bicycle riding with his sister on March 28, 1967, after which he had returned home for dinner and stayed there to watch television (18).

Appellant denied ever having seen Mrs. Goldman before she appeared in the police station, denied ever having been inside the furniture store and denied ever having shined Mrs. Goldman's shoes (18). He did not explain how Mrs. Goldman had known that he wore a leather cap, a coat with a fur collar and glasses (18).

Decision of the Family Court:

At the conclusion of the hearing the Court ruled that "the testimony and description of the petitioner was very accurate and the demeanor of the petitioner impressed the Court and her previous knowledge of the boy did as well" (27). The Judge stated that he was "convinced of the facts alleged" (28).

POINT I

Section 744 of the New York Family Court Act does not contravene the due process clause of the Fourteenth Amendment.

The crux of appellant's argument appears to be that since a possible outcome of a Family Court adjudication is detention for rehabilitative treatment, the standard of proof used in juvenile delinquency proceedings must be that of "reasonable doubt" and that, therefore, Section 744(b) of the Family Court Act is unconstitutional (Br., p. 12). At the same time, appellant himself points out (Br., pp. 29-30) that Section 713 of the Family Court Act grants jurisdiction over "persons in need of supervision", where a child is shown to be ungovernable or beyond the lawful control of his parents. Detention of such persons, where rehabilitation is needed, is authorized under Sections 754 and 756 of the Family Court Act. There is, of course, no need under the latter sections for a finding under the reasonable doubt standard. Yet appellant refers to this procedure with approval, recognizing that a child "might be engaging in a general course of conduct inimical to his welfare which calls for judicial intervention . . ." (Br., pp. 29-30). Appellant also refers to other instances where detention or serious disabilities are governed by a civil standard of proof—commitment to mental institutions or civil narcotic facilities (Br., p. 25).

Thus, appellant's own brief underlines the fact that there is neither a necessary nor a logical relationship between standard of proof and the possibility of subsequent detention. Indeed, several courts have pointed out that to impose the reasonable doubt standard in juvenile courts would be contradictory to the duty of such courts to intervene while the troubled child is still at a receptive age.

This analysis is well set out in *Matter of Arenas*, 453 P. 2d 915 (Sup. Ct. of Oregon, 1969). Oregon law, like

New York law, empowers the Juvenile Court to act both in cases where the child commits an offense which would constitute a violation of law if committed by an adult, and in cases where a child is beyond parental control or endangering himself and others. The court ruled:

> "If the Constitution is held to prohibit the Juvenile Court from depriving a juvenile of his freedom unless it is proved beyond a reasonable doubt that he committed a criminal act, the constitution would have to be interpreted to prohibit depriving a juvenile of his freedom when he was found to have engaged in conduct not amounting to a crime.
>
> The logical end of such reasoning would be the conclusion that regardless of how apparent the need for intervention for the good of the child, the community, the judiciary and every other institution or agency would be powerless to act until and unless criminal conduct could be proved beyond a reasonable doubt. We are of the opinion that such a result is not a requirement which logically extends from *Gault* [387 U. S. 1]. The direct holding and firm implication of *Gault* is that in order for the Court to acquire jurisdiction some proscribed conduct must be proved and the procedures for proving such conduct must include notice, right of counsel, right to confrontation and cross-examination and the privilege of self incrimination."

See in accord *In re Dennis, M.*, 75 Cal. Rep. 1, 450 P. 2d 296 (Sup. Ct. of Calif., 1969); *In re Ellis*, 253 A. 2d 789 (D. C. Ct. of App., 1969).

This court's decision in *Matter of Gault*, 387 U. S. 1, 10-11 (1967), explicitly avoided passing upon the issue of quantum of proof. At the same time it made clear that juvenile proceedings must accord fundamental fairness to young offenders. This fundamental fairness has been scrupulously preserved in the New York Family Court

Right to counsel and notice is guaranteed. (See §§ 241-249, 736, 737, 741.) Evidence must be competent and relevant (§§ 744, 745).

The post-adjudicatory process is predicated upon the child's needs and his capacity to change. Placement of a child in a training school does not involve a minimum term of retention. Thus, it resembles the civil commitment of a mentally ill person, and is totally unlike the imprisonment of an adult.

The civil nature of these training schools is characterized by an open setting without the restraints of locks or bars.* The cottage unit system which is generally used is made up of semi-independent groups, many of which are limited to 20 young people. House parents live on the premises and act as guides and mentors, as well as supervisors. Home visits are made by the boys and girls on a regular basis, and vocational and academic features are provided. (See Schools and Centers for Children with Problems, New York State Department of Social Services.)

No collateral disabilities follow an adjudication of juvenile delinquency. Sec. 782, Family Court Act. For impeachment purposes, a finding of delinquency is not a "prior conviction". Sec. 783, Family Court Act; *Murphy* v. *City of New York*, 273 App. Div. 492 (1st Dept. 1948). Nor may such adjudication be a bar to a position in civil service or to the receipt of a license. Sec. 782, Family Court Act; *Cuccio* v. *Civil Service Comm.*, 40 Misc. 2d 345 (Sup. Ct., N. Y. Cty. 1963).** A youth may tell a pros-

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*One annex at Goshen, New York is an exception and provides some security precautions for juveniles who have demonstrated that they would harm themselves or others seriously unless they are restrained.

**The earlier case of *Strong* v. *Kennedy*, 29 Misc. 2d 54 (Sup. Ct. N. Y. Co. 1961), cited by appellant at p. 23 does not support appellant's point. Indeed, the Court pointed out that Section 84 of the former Domestic Relations Court Act forbids that a delinquent's adjudication operate as a forfeiture of any right to public office and points out that such a forfeiture would be against public policy.

pective employer that he has never been adjudicated a delinquent. 67 Col. L. Rev. 281, 291, n. 57 (1968). The right to vote is also specifically preserved. See, New York Election Law, Sections 152, 154; *Green* v. *Board of Elections*, 259 F. Supp. 290 (S.D.N.Y. 1966).

The emphasis upon the need for treatment rather than a criminal act is also underscored by the fact that no child can be detained or even kept under supervisory jurisdiction if it is determined at the dispositional hearing (which succeeds the fact-finding hearing) that he is not in need of care or treatment. It is interesting to note that appellant commends as appropriate (Br., p. 28) the preponderance of the evidence standard at this stage, again recognizing the importance of judicial intervention where necessary.

Thus the Family Court Act, in both the sections relating to juvenile delinquency and the inter-related sections dealing with "persons in need of supervision", demonstrates that its primary concern is serving the needs of the child. The possibility of detention therefore cannot be a basis for mandating the criminal law standard of reasonable doubt in such proceedings.

In other contexts, the New York courts have not regarded the phrase "preponderance of the evidence" as excluding a construction requiring "clear and convicing evidence".* For example, in discussing State coram nobis hearings, Judge Botein held in *People* v. *Chait*, 7 App. Div. 399 (1st Dept., 1959), aff'd. 6 N. Y. 2d 855 (1959):

> "Once a hearing is granted • • • the petitioner has the burden of proving deprivation of his consti-

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* The standard of "clear and convincing evidence" was adopted by the Supreme Court of Arizona in *Application of Gault*, 99 Ariz. 181, 407 P. 2d 760, and left undisturbed by this Court in reviewing the decision. See also *In re Agler*, 19 Ohio St. 2d 70, 249 N. E. 2d 808 (Sup. Ct. of Ohio, 1969); *State* v. *Santana*, 444 S. W. 2d 614 (Sup. Ct. of Texas, 1969).

> tutional rights * * * His contentions must be established clearly and convincingly, by a preponderance of the credible evidence * * *"

See also, *United States ex rel. Brennan* v. *Fay,* 353 F. 2d 56 (2d Cir., 1965), reviewing the *Chait* case; *People* v. *Weiss,* 19 App. Div. 2d 900, 244 N.Y.S. 2d 914 (2d Dept., 1963).

The "clear and convincing" measure of proof was also created by judicial construction as to filiation cases under Article 5 of the Family Court Act. See e. g. *Commissioner of Public Welfare* v. *Ryan,* 238 App. Div. 607 (1st Dept., 1933); *Commissioner of Welfare* v. *Wendtland,* 25 App. Div. 2d 640 (1st Dept., 1966); *Martin* v. *Lane,* 57 Misc. 2d 4 (Fam. Ct., Dutchess Cty., 1968); *Matter of Gray* v. *Rose,* 30 App. Div. 2d 138 (3rd Dept. 1968).

B. It is not surprising that this Court has never declared that the measure of persuasion is an element of due process under the Fourteenth Amendment. This is consistent with the refusal to review the quantity (as opposed to the quality or admissibility) of evidence on direct appeal or collateral attack on a judgment. *Thompson* v. *Louisville,* 362 U. S. 199 (1960); *United States ex rel. Morton* v. *Mancusi,* 393 F. 2d 482 (2d Cir. 1968).

Indeed, terminology relating to quantity of evidence and measure of proof has frequently been criticized as unhelpful and unrealistic. As pointed out in *Wigmore on Evidence,* Third Edition (1940), Vol. IX, Section 2497, p. 325:

> "The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief . . . if this truth be appreciated, Courts will cease to treat any particular form of words as necessary or decisive in the law for that purpose . . ."

The English rule is referred to in *Rex* v. *Summers*, 1 All. E. R. 1059, 1060 (C. Cr. A. 1952):

> "I have never yet heard any court give a real definition of what is a 'reasonable doubt', and it would be very much better if that expression was not used."

This appears to be the reason why *Wigmore on Evidence*, Third Edition, *supra*, Section 2498, p. 327 opposes the extension of the reasonable doubt standard to cases where it has heretofore not applied:

> ". . . [T]he chief topic of controversy has been whether in certain civil cases the measure of persuasion for *criminal cases* should be applied. Policy suggests that the latter test should be strictly confined to its original field, and that there ought to be no attempt to employ it in any civil case.
>
> • • • • • •
>
> It is sometimes said that in general, *wherever* in a civil case a *criminal act is charged* as a part of the case, the rule for criminal cases should apply; but this has been generally repudiated." (Emphasis in original.)

From a realistic standpoint, there seems to be little basis for declaring any particular measure of persuasion to be an indispensable element of due process and to disturb and alter the historical development of the standards in juvenile courts, where decisions are made by experienced judges rather than by juries. The factor which is significant is that the state continues to bear the burden of proof, and that evidence to be adduced be competent and reliable.

The instant case illustrates this point. Appellant's commission of the act charged was clearly and convincingly proven. The saleslady whose handbag was stolen had left the bag in a locker room adjoining a small bath-

room. Appellant was seen running out of the bathroom, in which he had locked himself, where moments later the handbag was found with its contents scattered and the money missing. At the time, there were no customers in the store.

Not only did the saleslady recognize the boy, who had been in the store on at least six prior occasions and had shined her shoes, but she also described to the police the coat with the fur collar, leather cap and glasses which appellant wears. Appellant's uncle who testified for him as a witness contradicted himself and offered completely unconvincing evidence. The Court pointed out that "the testimony and description of the petitioner [saleslady] was very accurate and the demeanor of the petitioner impressed the Court and her previous knowledge of the boy did as well." While the judge stated that he was using preponderance of the evidence as a basis for his finding, he also made clear that he was "convinced of the facts alleged" (28).

POINT II

Section 744 does not violate the equal protection clause of the Fourteenth Amendment since the Family Court Act grants to juveniles under sixteen unique treatment appropriate to their age and capacity to be rehabilitated.

Appellant asserts that although this Court's decision in *Gault* was based upon a denial of due process, there was an implicit reliance upon the equal protection clause of the Fourteenth Amendment as well, in that this Court wished to accord to juvenile offenders certain critical safeguards which are guaranteed for adult criminals. However, as pointed out by appellant himself, there are numerous substantial differences in New York's procedure for adult and child offenders which afford special treatment to the latter group.

Appellant's brief (pps. 26-28) contains a catalogue of the unique aspects of the pre-judicial or "intake" phase (Family Court Act § 734). Regardless of whether or not the child has committed an act which would constitute a crime if committed by an adult, the case may be adjusted so that he never comes to court at all.

There are differences in the fact-finding hearing as well. Decisions are made by judges who are experts in the field, not by juries. And under § 762, the Court may on its own motion or on the motion of any interested person vacate any order issued in the course of a proceeding under Article 7. Sections 753-756 confer a broad range of further powers upon the Juvenile Court judge. Under § 716, he may change a petition alleging juvenile delinquency to one alleging that a child is a "person in need of supervision".

The mandatory secrecy in the proceedings which must be accorded to all children (contrast the discretionary Youthful Offender provision, § 913[g] of the N. Y. Code of Crim. Proc.) and the collateral consequences of a delinquency adjudication have already been described in Point I(A) *supra*.

Of equal significance is the dispositional hearing which succeeds the fact-finding hearing. If a child needs no care or treatment, the petition against him is dismissed at the dispositional stage. Appellant incorrectly states that "such a disposition is precisely like a suspended sentence in a criminal case" (Br., p. 28). Such a dismissal means that the child has not been found delinquent. Moreover, while a suspended sentence in a criminal case can be imposed under certain conditions, a dismissal at a dispositional hearing constitutes an unconditional discharge.

It is also important to remember that the child is correctly viewed by the public as in a different category from those over sixteen; his acts are taken less seriously in that

he is regarded as needing assistance rather than as a criminal.

As can be seen, differences in the treatment of children in the Family Court vis-a-vis adults in the Criminal Courts are advantageous to the child offender. Apparently appellant does not dispute this fact, but contends that the pre-adjudicatory and post-adjudicatory phases should not be considered in determining the measure of proof under § 744(b).

However, it is impossible to isolate the dispositional hearing and the purposes of the Family Court Act from the preponderance of the evidence standard. The equal protection clause which appellant invokes does not require identity of treatment. *Walters* v. *City of St. Louis*, 347 U. S. 231, 237 (1954). As this Court made clear in *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961):

> "The constitutional safeguard is offended only if classification rests on grounds wholly irrelevant to the achievement of the State's objective."

The objective of Article 7 of the Family Court Act is to allow necessary judicial intervention while the character of a child is still in the process of formation. With the adult offender there is, of course, always the hope that detention will have a rehabilitative effect. However, the criminal law is predicated upon the commission of certain acts and a prescribed punishment for those acts. By contrast, judicial supervision over a child is based upon a demonstrated need for psychological assistance.

That this purpose is a valid one has been attested by experts in the field. As the Court noted in *State* v. *Arenas*, *supra*, 453 P. 2d at 920:

> "The theory that some agency should have the power to intervene with juveniles when they have engaged in conduct indicating the need for such intervention has

substantial and respected backing from social and behavioral scientists." Task Force Report, Juvenile Delinquency and Youth Crime [The President's Commission on Law Enforcement and Administration of Justice] at pp. 22-28 [1967].

CONCLUSION

For all the foregoing reasons, the decision below should be affirmed.

Dated: New York, N. Y., January 8, 1970.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

(1)

Appellee suggests that appellant did not face a six-year confinement because section 758(c) of the New York Family Court Act provides that a "commitment" may not exceed three years. [Appellee's Brief, p. 1, n. 1.] Appellee has seemingly confused the difference between a "placement" and a "commitment" of a delinquent under the New York statute. [See also, Appellee's Brief, p. 22, n. 5.] They are two separate and distinct dispositions. FAM. CT. ACT, §753(b); §753(d). While a commitment is limited to three years [FAM. CT. ACT, §758(c)], section 756 of the statute provides with regard to placements that:

> (b) Placements under this section may be for an initial period of eighteen months and the court in its discre-